



PORT OF PORTLAND

Legal Department

MEMORANDUM

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To: Trey Harbert
From: Cory Streisinger
General Counsel
Copies: Chris Novotny
Cheryl Koshuta
Date: June 2, 2000
Re: Submerged Lands Ownership -- Willamette Cove and Portland Harbor

You have asked several follow-up questions regarding the ownership of submerged lands in Willamette Cove and the Portland Harbor. Specifically, you asked whether submerged lands are the same as sediments; whether DSL's ownership extends to near-shore sediments or just those in the ship channel; and whether the Port owned the sediments or the submerged lands at Willamette Cove. My answers follow. If you would like to discuss further, please feel free to set up a meeting.

First of all, you only asked about "submerged" lands but you probably also want to know about "submersible" lands. Both are owned by DSL and for all practical purposes you can think of them the same way. Submerged lands are those below "ordinary low water" in navigable waters, and submersible lands are those between "ordinary low water" and "ordinary high water." Basically, DSL owns everything up to the ordinary high water line. Here are the definitions, all within ORS 274.005:

(3) "Line of ordinary high water" means the line on the bank or shore to which the high water ordinarily rises annually in season.

(4) "Line of ordinary low water" means the line on the bank or shore to which the low water ordinarily recedes annually in season.

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(7) "Submerged lands," except as provided in ORS 274.705, means lands lying below the line of ordinary low water of all navigable waters within the boundaries of this state as heretofore or hereafter established, whether such waters are tidal or nontidal.

(8) "Submersible lands," except as provided in ORS 274.705 means lands lying between the line of ordinary high water and the line of ordinary low water of all navigable waters and all islands, shore lands or other such lands held by or granted to this state by virtue of her sovereignty, wherever applicable, within the boundaries of this state as heretofore or hereafter established, whether such waters or lands are tidal or nontidal.

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The "navigable waters" part of the definition refers to the body of water, not the location within the body of water. So, the Willamette River is "navigable waters" from shore to shore, not just within the shipping channel. It stops being "navigable" far upstream, when it turns into a trickle.

Submerged and submersible lands are real property – lands which happen to be under water. Sediment is one term used to describe the material that sits on the bottom of the river. So far as I know, "sediment" does not have a specific legal definition, although it may be defined for purposes of some environmental laws. For comparison, think of an upland parcel containing a gravel pit. The whole thing is "land" (real property). The gravel is part of the real property while it is sitting there, but it becomes personal property when you mine the gravel, put it in trucks, and take it away. Similarly, material sitting on the bottom of the river is part of the submerged lands until removed. DSL owns the material sitting on the bottom of the river because it is part of the submerged land. DSL is entitled to (and does) collect a royalty from those who mine sand and other substances from the river for commercial purposes.

With respect to Willamette Cove, whether the Port owned the sediments or submerged lands depends on how this area got to be a cove. Rivers naturally change their courses from time to time; riverbanks erode in some areas and grow in others by the natural deposit of material (called accretion). The general rule is that where these changes take place by natural forces over time, title also changes. Thus, a riparian (riverbank) owner whose property erodes is out of luck – he loses title as his land becomes submerged. On the other hand, the riparian owner whose land grows through natural accretion of material is in luck – she now has a larger parcel, and DSL loses title.

The rule is different, however, when the shape of the river changes suddenly (i.e., a large part of the bank falls into the river during a 100-year flood event), or when the change is due to human causes (dredging or filling). In that event, title does not change. If riverbank is dredged away, the upland riparian owner now owns the submerged lands which used to be upland. (That is how the Port acquired title to the submerged lands on the river side of PSY.) Conversely, if submerged land is filled, DSL still owns it. (We are currently negotiating with DSL over this issue at Hayden Island – the shoreline has changed through a combination of natural causes and fill, and there are title disputes over some of the areas.) In some cases historically, DSL allowed fill and then transferred title to the uplands created by the fill. (That is how the Port acquired title to the filled areas at the foot of the Swan Island lagoon.)

So, whether the Port owned submerged lands at Willamette Cove will require us to look at the cove's history. My incomplete recollection is that the upland was raised by fill, but that the submerged areas have always been submerged. If that is the case, and barring unusual facts, it is likely that the Port never owned the submerged lands.

As I am sure you are aware, lack of ownership will not have much bearing on our cleanup responsibility. It can assist us in insurance recovery, because insurance policies generally exclude coverage for contamination to our own property. However, good case law in Oregon establishes that when contamination threatens waters belonging to the state, the "own property" exclusion does not apply. In this case, even if the Port owned the submerged lands, the threat is to the river water flowing over them – which clearly belongs to the state. (The case establishing this rule dealt with contamination to an upland area that threatened groundwater beneath the site.

The court held that the "own property" exclusion was inapplicable because the state owned the groundwater, even though the policy holder owned the land.

I hope this answers your questions. Let me know if we need to discuss.